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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. ~~1788~~ 70-196

UMPQUA RIVER NAVIGATION COMPANY,
Petitioner,

v.

STATE OF OREGON, acting by and through its STATE FORESTER, and WESTERN LANE FOREST PROTECTIVE ASSOCIATION, a nonprofit corporation of the State of Oregon,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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THE OPINION BELOW

The opinion of the Supreme Court of Oregon appears at 91 Or Adv Sh 1167, — Or —, 478, P2d 631 (1970) and it is set out in full in the Petition at A33-57.

JURISDICTION

The respondents accept petitioner's statement of jurisdiction.

QUESTIONS PRESENTED

Respondents reject petitioner's conclusory references to trespass and violation of criminal statutes. Otherwise, its statement of questions presented is accepted.

Petitioner has set forth the appropriate constitutional provisions and statutes involved.

STATEMENT OF THE CASE

Respondents accept petitioner's statement of the case with the exception of the paragraph found at pages 8-9 of the statement of facts in which petitioner claims that the examination of its roller by the State Forester's mechanics changed the condition of that machine so that "petitioner's experts were unable to test and examine the engine meaningfully to determine its condition at the time the fire started or determine whether the state's claims about its condition at that time were accurate (Tr. 548-554, 562, 563, 586)." The trial court and, upon review de novo of the equitable defense, the Supreme Court of Oregon both found to the contrary:

> "We find, as did the trial court, that the defendant was able to and did conduct adequate examinations and conduct sufficient tests in September 1966 to enable it to present its defense. In addition, we have doubt whether the actions of the State's witnesses substantially changed the condition of the roller. We have read the testimony of the expert called by the defendant, Mr. Nelson, and we do not believe he was convinced that the deteriorated condition of the roller in 1967, a year after the fire, was due to the action of the State. We hold that the trial court was correct in finding against the defendant on its affirmative defense." 478 P2d at 641, set out at Pet. A56-57.

REASONS FOR DENYING THE WRIT

The writ should be denied because the facts do not support the issue and also because the opinion below is correct.

A. THE FACTS DO NOT PRESENT THE ISSUE

This case does not present a satisfactory set of facts upon which to decide whether the exclusionary rule should be made mandatorily applicable in purely civil litigation in which the state is a party. The Fourth Amendment forbids only "unreasonable" searches and seizures; the conduct of the State Forester was reasonable.

Petitioner contends that the State Forester's examination was unreasonable for three reasons: (1) It was "a trespass;" (2) it was warrantless; and (3) it violated one or more Oregon criminal statutes (Pet. 13). The petitioner's analysis is incorrect.

(1) The examination was without petitioner's consent. It was trespassory only if it was unlawful. It was not unlawful.

(2) The State Forester, not a criminal investigator, was not conducting a criminal investigation in which a search warrant was obtainable under ORS 141.010.[1]

(3) Respondent disputes petitioner's half-hearted suggestions that "agents of the state probably violated one or more criminal statutes" of the joy-riding variety.

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[1] Oregon law does not provide for search warrants in civil cases. ORS 141.010, the search warrant statute, provides:

"A search warrant may be issued upon any of the following grounds:

"(1) When the property was stolen or embezzled.

"(2) When the property was used in the commission of, or which would constitute evidence of, the crime.

"(3) When the property is either in the possession of a person who intends to use it as the means of committing a crime or in the possession of another to whom such person delivered it for the purpose of concealing it or preventing its being discovered."

We will not at this stage analyze the appropriate Oregon criminal statutes; petitioner has merely set them out without analysis at page A60-63. It suffices to say that a technical reading of the statutes, combined with the absolute lack of criminal intent, renders the State Forester's action nonculpable.

The Supreme Court of Oregon did not hold the search to be unlawful. It assumed illegality for the purpose of argument regarding the applicability of the exclusionary rule in civil litigation.

The forester's action was reasonable. Upon notice of the fire, which ultimately destroyed 43,000 acres of forest land, he ordered an investigation of its origin. On the second day, his agent, Norris Joyce, proceeded to the suspected point of origin. He had reason from two sources to suspect that the petitioner's roller was the cause of the fire. He discovered the twenty-year old flat wheeled roller near the point of origin. Petitioner had removed all of its other movable equipment from the fire area, leaving only the roller. It was evident that the roller was equipped with a straight exhaust stack which showed carbon deposits and slobbering oil on its exterior. It had no muffler or spark arrester. The entire area around the roller had been burned.

Mr. Joyce made a visual inspection at that time. At his instance, mechanics made visual and physical examination of the roller over the next few days, including tests wherein they operated the machine and removed and replaced certain of its parts for inspection. The roller was then left where it had been found.

Mr. Joyce clearly had probable cause to believe that the roller was the cause of the fire. Were there a procedure to obtain a warrant to search and seize an instrumentality of civil negligence, he would have had sufficient information upon which to obtain it. He clearly did not act arbitrarily, but rather his conduct was that of a reasonable man.

The Fourth Amendment seeks to protect the privacy of a person in his home and in the contemparary functional equivalents of his home, e.g., the office, the automobile, or the telephone booth. In each case the reasonable expectation and assurance of privacy is meaningful and substantial. Here the petitioner removed all of his other equipment from the scene and left its twenty-year-old roller in the middle of a burning forest. While that may or may not constitute a technical abandonment, it reflects upon reasonableness. The petitioner's reliance upon the exhaust stack as a vessel of privacy was surely minimal. There is no concealment uncovered, no confidentiality breached, no personal privacy violated. Simple examination and tests were performed on an old roller which had been left to the ravages of a forest fire in the reasonable attempt to determine the origin of that fire.

If the Supreme Court is to consider whether the exclusionary rule shall be made applicable to civil litigation, it would seem more appropriate to do so in the case of an unreasonable and substantial invasion of privacy.

B. THE OPINION BELOW IS CORRECT

The opinion of the Supreme Court of Oregon, per Denecke, J., set out fully in the Petition at page A33, is

ably and persuasively reasoned. We add only these few thoughts.

Petitioner cites *Weeks v. United States*, 232 US 383 (1913), *Mapp v. Ohio*, 367 US 643 (1961) and *One 1958 Plymouth Sedan v. Pennsylvania*, 380 US 693 (1965) for the agreed proposition that the exclusionary rule applies to bar unreasonably seized evidence in criminal and quasi-criminal cases. Petitioner then cites *Camara v. Municipal Court*, 387 US 523 (1967) and *See v. City of Seattle*, 387 US 541 (1967)[2] to demonstrate that the Fourth Amendment is also applicable in civil cases and thus the exclusionary rule is equally applicable. The leap is fallacious.

The issue is not whether the Fourth Amendment applies in this case or that. The Fourth Amendment applies to all interaction of citizen and state regardless of whether the matter ever reaches litigation. The question is whether the exclusionary rule is necessary to deter unlawful state activity in the investigation of civil cases. It is not.

Evidence which is relevant and trustworthy should not be excluded unless strong policy considerations necessitate a contrary rule. *Mapp v. Ohio*, supra, is predi-

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[2] *Camara* and *See* were decided in 1967. The events in this case occurred in 1966. The hearing on the Motion to Suppress Evidence and the trial were conducted in 1968. Regardless of merits, a question naturally arises as to the retroactive application of *Camara* and *See* to events which preceded those decisions. See *Stovall v. Denno*, 388 US 293 (1967). The retroactivity problem is but one more indication of the inappropriateness of these facts for the resolution of the issue which petitioner wishes to be decided.

cated upon: (1) the existence of a pattern of Fourth Amendment violations by police in the conduct of criminal investigation due to the particular nature of the war against crime, and (2) the inability and failure of the state to develop alternative mechanisms for the effectuation of the Fourth Amendment. Because it serves to remove the evidentiary profits of a bad search, the exclusionary rule was found to be the only feasible mechanism to deter police officers from the conduct of unreasonable searches.

Investigation preparatory to civil litigation, unlike criminal investigation, is not by its very nature fraught with dangers to civil liberties. No analogy can be made out between the petitioner's abandoned flat wheeled roller in the burned out forest and the papers recovered from Dollree Mapp's bosom. Petitioner has failed to demonstrate by the facts of this case or a review of similar cases a pattern of Fourth Amendment violations in civil litigation so threatening as to demonstrate a need to deter foresters from violation of law. It is indeed hard to conjure Norris Joyce and his mechanics examining the road roller in the woods, if unchecked by law, as the forerunners of a police state.

Because civil litigation is by its very nature different than criminal litigation and because its sanction is so less harsh, it is not necessary to invoke the drastic remedy of the exclusionary rule. There is no reason to blind the jury to trustworthy evidence where alternate remedies can be fashioned. In the nature of things, civil defendants are usually solvent. In this case, the prayer

asks for almost a million dollars. Governments and juries are generally more sensitive and responsive to the complaints of such persons than to complaints of those who are most commonly associated with the world of crime. Further, they may be expected to have the wherewithal to bring a civil suit for violation of their civil rights if they are truly aggrieved and not merely defending against their obligation to make good to the public the cost of their negligence.

The opinion below summarizes our arguments well:

> "In summary, we do not find that illegal searches and seizures outside the area of law enforcement officers investigating crimes occur frequently. In addition, we have not been shown, if such were the practice, that remedies other than exclusion of evidence would be inadequate to deter the continuance of such practice. On the other side of the ledger, we continue to regard a trial as a search for the truth and, therefore, competent evidence should never be excluded except for the most compelling reason. We hold that illegally seized evidence should only be excluded in a criminal or quasi-criminal proceeding and if obtained by law enforcement officers investigating criminal activity. The order of the trial court excluding the evidence was in error." 478 P2d at 638-639.

CONCLUSION

Because the facts of this case are not satisfactory for the resolution of the issue which petitioner seeks to pose, and because the decision of the Supreme Court of Oregon was correct on the merits, the writ of certiorari should be denied.

Respectfully submitted,

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